NO. 11594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF THE UNITED STATES, *Appellant*,

vs.

WILLIAM WADE RICKETTS, *Appellee.*

On Appeal From the District Court of the United States for the Eastern District of Washington Northern Division

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BRIEF FOR THE UNITED STATES

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INDEX

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OPINION BELOW

The two memorandum opinions of the District Court (R. 227-240 and R. 345-356) are not reported.

JURISDICTION

This action was instituted under the provisions of Title 8, Sec. 903, U. S. C. A., being that section of the Nationality Act which permits any person who claims a right or privilege as a National of the United States and who is denied any right or privilege by any department or agency of the United States on the ground that he is not a National of the United States to bring an action against the department or agency who refuses him that right, either in the District Court of the District of Columbia or in the District Court in

which the aggrieved person claims residence. This action was instituted by the appellee as plaintiff claiming that he was a citizen of the United States and that the Immigration and Naturalization Service of the Department of Justice was seeking to deprive him of that right by insisting that he was not an American citizen but a British subject and unlawfully in the United States and subject to deportation.

The action was correctly brought by the appellee as plaintiff in the District Court for the Eastern District of Washington, which was the District in which the appellee claimed to be a resident, against the Attorney General of the United States, who is head of the Immigration and Naturalization Service of the Department of Justice. (R. 2-4).

QUESTIONS PRESENTED

1. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 5 (R. 359) which is as follows:

> "That on February 2, 1923, the petitioner became twenty-one years of age and then lived in the Dominion of Canada. That the petitioner returned to the United States about November of 1926. That he remained in the United States for a period of approximately six months, then returned to the Dominion of Canada where he resided until 1936 when he again entered the United States. That since 1936, the plaintiff has remained constantly therein, engaged in business, participated in civic affairs, registered as a voter, and voted in elections in the United States."

2. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 6 (R. 359) which is as follows:

> "That the petitioner did not by his own voluntary act expatriate himself, but to the contrary has continuously asserted his claim of United States citizenship."

3. Whether the Court was justified from the evidence in the case in making Conclusion of Law No. 1 (R. 359) which is as follows:

> "That the petitioner is entitled to the benefit of the proviso contained in Title 8, Section 801-A, U.S.C.A."

4. Whether or not the Court erred in holding as a matter of law that the petitioner was a citizen of the United States.

STATUTES INVOLVED

The statutes involved in this case are set forth in the Appendix.

STATEMENT

The facts in this case as disclosed from the evidence and as found by the Court are briefly as follows:

That the petitioner, William Wade Ricketts, was born in the town of Hydro, Oklahoma on February 3, 1902. (R. 313). He was the son of Siegel Ricketts who was an American citizen born in the State of Iowa (R. 10). His mother likewise was an American citizen. She was born in Barnville, Illinois (R. 287).

Petitioner's parents were residents of the State of Oklahoma and native born American citizens at the time petitioner was born. Petitioner was taken to Canada by his parents in the month of July, 1910, when he was about eight years of age. His parents were attracted to Canada by the land that was open for homesteading. The certificate of naturalization of petitioner's father, Siegel Ricketts, is set forth in defendant's Exhibit II (R. 169-171) and shows that Siegel Ricketts became a British subject December 31, 1914. Petitioner's mother also became a British subject by virtue of her husband's naturalization and residence on a homestead in Canada.

The petitioner remained in Canada until he was twenty-four years and four months of age, or until June 12, 1926, Defendant's Exhibit 2 (R. 219, 222, 247, 342) when he entered for the first time. Before coming to the United States in 1926, the petitioner, after reaching his twenty-first birthday, contracted a common law marriage in Canada on February 28, 1923 (R. 221-223). Two children were born in Canada. When the petitioner came to the United States the second time in the fall of 1926, he brought his common law wife and oldest child. When he went back to Canada in the spring of 1927 (R. 222) he took his wife and child back with him and they have never since returned to the United States. The children are still minors and still reside in Canada (R. 223). Ricketts was admitted as a visitor on both occasions when he entered the United States in 1926 Defendant's Exhibit 2 (R. 243-264), Defendant's Exhibit 3 (R. 230), Defendant's Exhibit 6 (R. 234).

His next entry into the United States following his departure at the termination of his second visit, in the spring of 1927, was approximately ten years later on September 6, 1936, Defendant's Exhibit 3, (R. 230) at which time he entered as a temporary visitor. His next entry was on June 14, 1937, Defendant's Exhibit 6 (R. 234), also as a temporary visitor. He again entered the United States on November 3, 1937 without an immigration visa or document entitling him to do so by walking across the international border and not reporting at a United States Immigration office for inspection (R. 192 and 229), Defendant's Exhibit 2, Question 11 (R. 247). Defendant's Exhibit 2 was subscribed and sworn by the petitioner before James E. Sullivan, U. S. Immigrant Inspector, on August 2, 1943 (R. 264). There seems to be some confusion as the petitioner stated at the hearing (R. 11) that he first returned to the United States in 1925, and returned to Canada after approximately six months, or in April, 1926 (R. 12); that he again came to the United States the following fall and returned to Canada five months later or in the spring of 1927 (R. 13), both times at Eastport, Idaho. The Immigration and Naturalization Service has no written record of these entries into the United States, but the fact remains that between 1926 and 1942, the petitioner did not at any time make any claim that he had entered the United States with the intention of residing permanently. His first such claim was advanced on April 1, 1942. Defendant's Exhibit 15 (R. 291). In his relations with the United States Immigration and Naturalization Service, the

petitioner filled out numerous forms and was also given numerous hearings before he instituted this action, in all of which he claimed to be a British subject or a Canadian citizen. Defendant's Exhibit 2 (R. 244), Defendant's Exhibit 3 (R. 230), Defendant's Exhibit 5 (R. 322), Defendant's Exhibit 6 (R. 234), Defendant's Exhibit 7 (R. 235), Defendant's Exhibit 8 (R. 69), Defendant's Exhibit 12 (R. 183), Defendant's Exhibit 14 (R. 267), Defendant's Exhibit 17 (R. 314).

The petitioner admitted that in Canada he had the full rights and privileges of a Canadian citizen; that he held public office in Canada as a school trustee and Counsellor of the Municipality of Round Hill, Saskatchewan, which was an elective position and is the same as a County Commissioner of a County in the United States, and that he had to be a citizen of Canada to hold that position; that he served in that capacity after he had reached his eighteenth birthday. He also stated that he had to be a citizen of Canada in order to be a school trustee (R. 315-316) and at the time he considered himself to be a citizen of Canada and had no intention of ever returning to the United States. Petitioner stated that he voted in school and municipal elections several times (R. 317); that he voted in the Provincial election in 1927 when he was twenty-five years of age; that he attempted to vote in the Dominion election in 1930 when he was twenty-eight years of age but they refused to permit him to vote because he was out of his home constituency (R. 317).

When returning to the United States in September, 1936, the petitioner was admitted as a Canadian citizen and as a visitor for two weeks. Defendant's Exhibit 3 (R. 230). He stayed three months and then obtained an extension. Defendant's Exhibit 5 (R. 232). The petitioner was again admitted on June 14, 1937, Defendant's Exhibit 6 (R. 234), for a temporary visit of two months. He later returned to Canada to see the American Consul at Vancouver, B. C., about securing a visa to enter the United States as a permanent resident (R. 194 and R. 274). He was later excluded from admission to the United States, Defendant's Exhibit 12 (R. 184), but entered unlawfully on November 6, 1937 (R. 325) and was subsequently apprehended and deported by United States Immigration Officials from the United States on June 17, 1938 (R. 328). After being deported he again entered the United States by evading inspection at Babb, Montana, in December, 1939 (R. 326). He was again apprehended by Immigration officials and deportation proceedings were instituted, Defendant's Exhibit 17 (R. 211). He was offered an opportunity to depart voluntarily in lieu of deportation (R. 16-17) and did depart in May or June, 1944 (R. 17). He was unable to obtain an immigration visa and thereafter returned to the United States about the first of October, 1944 (R. 150).

Ricketts, since 1944, has taken the position that he is entitled to remain in the United States and is a citizen of the United States. The petitioner registered under the requirements of the Selective Service and Training Act at Spokane, Washington, and returned

a questionnaire dated May 14, 1942 stating that he was not a citizen of the United States and was last a citizen or subject of Canada (R. 32). Ricketts was later apprehended by the Immigration authorities in January, 1943 and at their suggestion made a trip into Canada for the purpose of securing credentials to enter the United States (R. 16-17). At that time he applied for and obtained a British passport as a Canadian citizen. The passport is set forth as Defendant's Exhibit 10 (R. 165).

At the trial the petitioner produced witnesses to the effect that during the time he resided in Canada, before 1936, that he had maintained to these witnesses in private conversations that he was an American citizen and not a British subject. The testimony of these witnesses is as follows:

Forrest Dale Campbell (R. 141)
Albert W. Cull (R. 85)
John Blair Lowrie (R. 127)
John Gardner McDougall (R. 111)

In addition several witnesses were furnished by the petitioner at the trial to testify that since his residence in the State of Washington he claimed to be an American citizen:

George Forbes (R. 215)
Harold Gubser (R. 102)
Ernest McCall (R. 76)

The Court, after having heard the testimony, returned an oral opinion (R. 227) holding that Ricketts was not an American citizen because of the fact that

after his twenty-first birthday he did not make an election to retain his American citizenship but instead, although only a few miles away from the United States, remained in Canada for a period of years. The court stated as follows (R. 239):

> "Under those circumstances we can't say he did establish premanent residence or assume the duties of citizenship, prior to 1936, which was too long, it seems to me, for him to make an election."

After he returned to Canada in 1926 he voted in the general election there. He never voted in a general election in the United States (R. 207 and 318).

A motion for new trial was made by the plaintiff (R. 339). Arguments were had upon the motion and the Court, on December 23, 1946, rendered a second oral opinion in which he reversed his former oral opinion of October 2, 1946. The second oral opinion of the Court was based upon the fact that the petitioner had until two years after the effective date of the statute, or until two years after the Nationality Act of 1940 went into operation, or until January 13, 1943, in order to make his election as to whether or not he should become an American citizen. The Court now took the position that Ricketts had made his election to claim American citizenship before 1943 and was therefore an American citizen and not subject to deportation.

STATEMENT OF POINTS TO BE URGED

1. The appellee failed to return to the United States within a reasonable time after his twenty-first birthday and therefore forfeited his claim to American citizenship.

2. The appellee elected to exercise the duties of a Canadian citizen or British subject prior to his entry into the United States for permanent residence and by virtue of the provisions of law relative to expatriation as set down in the case of *Perkins* v. *Elg*, 307 U. S. 325, lost his nationality as an American citizen.

SUMMARY OF ARGUMENT

The petitioner made an election after attaining his majority to become a British subject. The whole life of the petitioner until 1936, when he was nearly thirty-five years of age, was centered in Canada where he voted, held political office, married, raised his family and earned his livelihood. His claim to American citizenship is not definitely asserted until 1944 when he was forty-two years of age.

The Nationality Act of 1940, Title 8, Sec. 801 U.S.C.A., did not contemplate that a person who had already given up his citizenship or expatriated himself by his own voluntary act and deed could later claim American citizenship. The record in this case is abundant with evidence to the effect that the petitioner did choose to become a British subject by his own voluntary acts. These consist, in addition to holding public office and voting in Alberta and Sas-

katchewan, of marrying a Canadian woman and raising children in Canada and leaving them there when coming to the United States. It certainly can be presumed that petitioner did not intend to leave his minor children in a foreign land while claiming himself to be an American citizen. In addition to this, he worked and maintained his family in Canada for years, and never once contended that they were American citizens. In view of all these circumstances the petitioner expatriated himself beyond any doubt.

ARGUMENT

As has been pointed out, the evidence in this case was that the petitioner, William Wade Ricketts, was born in Hydro, Oklahoma, on February 2, 1902 of American parents. The parents emigrated to Canada, his father becoming a British subject in order to obtain title to a Canadian homestead on December 31, 1914. By virtue of this citizenship his mother also became a British subject. At the time the father obtained Canadian citizenship as a British subject, the petitioner was almost thirteen years of age. He continued to live in Canada with his folks during minority and didn't return to the United States until years later. He held the offices of school trustee and Counsellor of the Municipality of Round Hill, Saskatchewan (R. 315) which were elective positions. He stated that he had passed his eighteenth birthday at the time and that he had to be a citizen of Canada to hold these positions (R. 316). He also stated that he had no intention at that time of ever returning to the

United States to reside. He stated that he intended when he became of age to remain in Canada indefinitely and assume the rights and privileges of a Canadian citizen (R. 317). He stated that he had voted in school and municipal elections several times (R. 317). He stated that he only voted once in the general election in Canada and in 1930 he tried to vote in the Dominion election but the authorities refused to let him vote because he was out of his home constituency at the time of the election. It should be remembered that the petitioner was then twenty-eight years of age and when he voted in the Provincial election in 1927, he was twenty-five years of age. It is apparent from these actions that the petitioner exercised full duties and full responsibilities as a Canadian citizen, at least up to and including 1930.

Petitioner's visits to the United States are set forth in a form executed by him as Defendant's Exhibit 2 (R. 242). In that form, which was filled out on August 2, 1943, the petitioner states that he was a British subject (R. 244) and that he first entered the United States on June 12, 1926 as a visitor from Canada. He next entered the United States on December 15, 1926 as a visitor. The first visit to the United States comprised about six weeks, the second visit to the United States began December 15, 1926 and comprised a period of about three and one-half months. He did not enter the United States again until September 10, 1936 when he stated that he entered the United States as a visitor. He was then thirty-four years of age. He stayed until June 1,

1937. He next entered the United States on June 17, 1937 as a visitor and stayed until he voluntarily left on October 27, 1937. The petitioner states that his next visit to the United States was December 6, 1939. In none of these entries or the hearings based thereon or in the questionnaires executed by the petitioner did he claim to be anything but a British subject and a resident of Canada.

It should also be remembered that on February 28, 1923, the petitioner contracted a common law marriage in Canada. Two children were born as the issue of this marriage. The oldest child and wife accompanied him to the United States in 1926 on his second visit. They returned to Canada and never came back to the United States (R. 221-223). The children are still minors and still remain in Canada. Petitioner later obtained a common law divorce from his wife but the children, who are residents of Canada and citizens thereof, are still being supported by him (R. 223).

The petitioner became twenty-one years of age on February 2, 1923. For a period of thirteen years after becoming of age he spent about four and one-half months in the United States, during which time he stated that he was a visitor and a British subject residing in Canada. Canada is very close to the United States so it would be very easy for him to come to the United States if he so desired for permanent residence because of his proximity thereto. Instead of coming to the United States, he proceeded to contract a common law marriage in Canada to a

British subject. Children were born as the issue of this marriage who reside in Canada. He made no effort to take his common law wife and children to the United States but instead lived there and took part in political affairs in Canada and voted several times in the school and municipal elections and once in the Provincial election and attempted to vote in the Dominion election in 1930 when twenty-eight years of age (R. 316-318). The petitioner proceeded to cast his vote in the 1927 Provincial election after having been admitted twice to the United States in June, 1926 and December, 1926. His wife at that time suffered ill health in Spokane and in the spring asked Ricketts to take her back to Canada, which he did. Although he states that he intended to remain permanently in the United States at that time, immediately the next year he continued his duties as a Canadian citizen and British subject by voting in the election there and continuing to vote or attempting to vote until at least the Dominion election in 1930. These actions on his part were wholly inconsistent with his present contention that he is an American citizen and that he intended to remain premanently in the United States in the spring of 1927. The testimony of the various exhibits in the case is to the effect that Ricketts stated that he had no intention of staying in the United States in 1926 and 1927 but was merely here as a visitor to see how things were on this side of the line.

Title 8, Sec. 801, U.S.C.A. provides that:

> "A person who is a National of the United States whether by birth or naturalization, shall

> lose his nationality by * * * That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date hereof to return to the United States. * * *

It is the contention of the appellant in this case that Ricketts did expatriate himself by his own voluntary act. It is conceded that residence alone for a period of thirteen years would only be a circumstance showing that he had elected to be a British subject but in addition to this is his long period of residence after his twenty-first birthday. We have in addition to that fact the voting record of petitioner. It should be apparent that Ricketts at the time he voted must have considered himself to be a British subject or he would not have exercised the franchise in Canada on several occasions dating up to his twenty-eighth birthday at least. In addition to that fact the petitioner proceeded to take a part in Canadian politics and governmental affairs by holding office as a school trustee and as a Counsellor of the town of Round Hill, Saskatchewan. He states that he was over eighteen years of age when he held these positions and that the laws of Canada permitted him to hold these public offices when he was over eighteen (R. 316).

It is a matter of common knowledge that before a person can hold any public office he must take some oath of allegiance to maintain and support the laws of the country under which he is holding office the same as a person holding a school or municipal office in the United States must take an oath that he will support the Constitution of the United States and the State of which he is a resident. Certainly Ricketts had to do this in Canada in order to qualify for the positions to which he was elected although the record does not indicate that this took place after his twenty-first birthday. The fact does remain that the record disclosed that immediately prior to his twenty-first birthday he considered himself to be a British subject to the full extent that he was willing to hold office in Canada. This is entirely inconsistent with his later statements arrived at and made by him in later years to other persons that he considered himself to be an American citizen.

In looking at this case realistically, if Ricketts did sincerely believe that he was an American citizen he would not have entered Canadian politics and not have held any political office of any character in Canada. He would have attempted to establish residence across the border in the United States and vote there.

In his final judgment, setting aside the findings and judgment previously entered in this case, it was made clear by Judge Driver that the reversal of his position was due principally to what he considered his previous erroneous assumption that the Nation-

ality Act of 1940 did not apply to this case (R. 346). He indicated that his study of the Report of Hearings before the House Committee of Immigration and Naturalization on the bill which finally became the Nationality Act of 1940 had convinced him that the provisions of that Act, particularly the second proviso to Section 401(a) (Section 801(a) U.S.C.A. were applicable here. This, he stated, is because this proviso

> "Shall allow everyone, under these circumstances, to come in provided he hasn't expatriated himself by his own voluntary act, means taking the oath of allegiance to a foreign country or some other similar act." (R. 353).

The Court also stated:

> "There is nothing here on which to base expatriation except continued residence in Canada."

Careful study of the testimony, debate and statements in the report of the Committee Hearings concerning Section 401(a), and particularly the second proviso to that section, indicates that the Court erred in these statements. It also makes clear the following facts:

(1) That the language of the second proviso to Section 401(a) of the Nationality Act of 1940 is that proposed by the representatives of the Department of Labor of which department the Immigration and Naturalization Service was then a part.

(2) That the Department of Labor did not intend this proviso to permit the return within two years

of *all* persons who had acquired a foreign nationality through the naturalization of a parent, but only those who had not prior to the date of the Act expatriated themselves as American citizens by (1) the operation of the treaty, (2) by statute, or (3) by a voluntary act.

(3) That in assuming the position that expatriation might occur from a voluntary act on the part of such persons, other than one covered by treaty or statute, the Department of Labor relied upon the then recent opinion of the U. S. Supreme Court in the case of *Perkins* v. *Elg*.

> "To cause a loss of that citizenship *in the absence of treaty or statute having that effect, there must be voluntary action* and such action can not be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice." (*Perkins* v. *Elg*, page 333) (Italics supplied).

(4) That the Department of Labor did not then consider that the fact of foreign residence alone was sufficient to cause expatriation.

(5) That with respect to the status of persons under the second proviso of Section 401(a) who had acquired a foreign nationality and allegiance through the naturalization of a parent, the position of the Department of Labor was clearly indicated at the Committee Hearings by the statements of one of its principal representatives, Mr. Thomas B. Shoemaker, then and still Deputy Commissioner of Immigration and Naturalization, as follows:

> "Our position so far as the clause which has been included in the code is concerned is that in these cases where the individual has not voluntarily by his own act expatriated himself, *and there is a doubt as to whether he has adhered to the foreign allegiance to the exclusion of the American allegiance*, he should be given the opportunity to return to the United States within a period of two years, and then if he failed to do so, he is forever estopped from claiming American citizenship, either through the act of birth or whatever his claim must be based upon." (Italics supplied.)

There can be no "doubt" here that the plaintiff adhered to a foreign allegiance in view of his voting, holding public office and asserting his Canadian citizenship over a period of many years.

Mr. Shoemaker, on pages 254 and 255 of the Report of Committee Hearings, stated:

> "We do believe, on the other hand, that if there is to be any amendment that a child or any person who has *in good faith believed themselves to be American citizens and represented and acted under that impression abroad*, should be given an opportunity within two years to return to the United States, and if they do not return within the period of two years of the date of approval of this amendment, they will then forever be estopped by such failure from thereafter claiming such American citizenship by virtue of the claims which they then had." (Italics supplied.)

Again on page 255, Mr. Shoemaker stated:

> "Why question the status of the individual who, for instance, has been away and *always acted as a citizen and thought he was a citizen and has* been stopped from coming back because

> the Department of Labor abided by that ruling (Ref. to Tobiassen Ruling). We say if those people have not done anything to expatriate themselves that then they as individuals should be given a period of time to return, if they prefer to do so, and a reasonable period of time should be granted for them within which to return." (Italics supplied.)

Plaintiff by his own admission, over a period of many years did not believe himself to be an American citizen and certainly did not represent himself so to be or act as one when he ran for public office and voted in Canada.

Mr. Shoemaker on page 256 of the Report of Committee Hearings stated:

> "Since the fourteenth amendment to the Constitution was enacted in 1868, a person born in the United States to be a citizen of the United States by virtue of that amendment; therefore, the individual to whom I refer who has not expatriated himself *by a voluntary act*, would continue to be an American citizen. The Supreme Court in the Elg case referred to three methods of expatriation; namely, *by statute, by treaty and by voluntary action.* The mere remaining abroad is not characterized definitely as a loss of citizenship but if that individual to whom you refer comes back to the United States and does not return to the foreign country as a citizen of the United States, but if on the contrary he has taken naturalization and has been expatriated, he will not be admitted. On the contrary, if he has not committed any voluntary act, he will be." (Italics supplied.)

As previously stated, the amendment to Section 401(a) of the Nationality Act (second proviso) was suggested by, and is in the language of, representa-

tives of the Department of Labor. In finally adopting that amendment the Committee made it clear that it was not intended to open the gate to everyone, and, too, that any person contemplated in Section 401(a) would be required to satisfy consular and/or immigration officers that he had not lost his United States citizenship.

Report of Committee Hearing, page 318:

> "The Chairman. That is along the line suggested by the Department of Labor. Am I correct in making that statement?
>
> Mr. Rees. Yes, sir; that is right.
>
> Mr. Mason. During that 2 years and 90 days they are left in status quo you do not know whether they are or not citizens?
>
> Mr. Rees. Yes, sir; that is correct.
>
> Mr. Lesinski. In other words, they have to prove to the United States that they are citizens and that they have not done anything to take citizenship away from them?
>
> Mr. Rees. Just as they are now.
>
> Mr. Lesinski. This would be the group that has been away 30 or 40 years?
>
> Mr. Rees. That is the group we are talking about."

Report of Committee Hearing, page 321:

> "The Chairman. Yes, but we are saying you have gone too far, and we want to stop you. We do not make him a citizen, and the burden is upon him to show he is a citizen.
>
> Mr. Van Zandt. If we use the words "who claims to be a citizen," that would cover it—

Mr. Curtis. Then you open the gate to anybody.

The Chairman. Using the words "who is a citizen" puts the burden on him.

Mr. Mason. I move the adoption of this amendment, Mr. Chairman.

Mr. Lesinski. The motion is made that this amendment to section 401(a) be accepted as read.

(The motion was carried.)"

From the foregoing and from the report of the Committee Hearings as a whole, it will be seen that the representatives of the Department of Labor were seeking to provide for the admission as a United States citizen within two years from the date of the Act of any person who had acquired a dual nationality and consequently a foreign allegiance through the naturalization of a parent provided he had done nothing himself that would have caused his expatriation. They indicated that the principles stated by the Supreme Court in the Elg case, which was then the law of the land, would be followed in determining whether any such person "has not heretofore expatriated himself as an American citizen by his own voluntary act." If such expatriation had not occurred on the date the Act became effective, then its provisions would operate to protect him for a period of two years unless, after January 13, 1941, he did one or more of the things specified in the other subsections of Section 401(a) as acts of expatriation; otherwise, the provisions of this act would not apply. Here we contend that plaintiff expatriated himself by volun-

tary acts, voting, holding public office and holding himself out as a citizen of Canada and consequently that the provisions of Section 401(a) are not applicable.

In determining the citizenship under the principles laid down in the Elg case, the representatives of the Department of Labor did not propose to hold that foreign residence alone be considered a voluntary act sufficient to cause expatriation, and in this respect they differed with representatives of the Department of State. The representatives of the Department of State opposed adoption to the second proviso of section 401(a) and argued for legislation that would have required indefinite application of the principles of the Elg case in determining citizenship in this class of cases. The interpretation placed upon the Elg opinion by the representatives of the Department of State was different from that of the representatives of the Department of Labor in that the State Department held that continued foreign residence after attaining majority was a voluntary act sufficient to cause expatriation. The Department of Labor, however, took the position that regardless of the length of foreign residence if the person had always in good faith believed himself to be an American citizen, he should not be considered to have become expatriated at least until given an opportunity to return and claim his United States citizenship. It seems clear that any of these persons, who in addition to living abroad, exercised the right of franchise, ran for and were elected to public offices, and in their dealings with officers of the foreign country and of the United

States claimed the foreign nationality to the exclusion to that of the United States could not qualify for admission to the United States under this provision.

The case of *Schaufus* v. *Attorney General of the United States*, 45 Fed. Supp. 61, is somewhat analogous to the situation existing in this case. In the Schaufus case the petitioner was born of American parents in Germany, and was a United States citizen at birth under Sec. 1993 Rev. Stat. U. S. Except for a visit of three years in the United States when he was brought here by his parents at the age of two years, the petitioner never returned to the United States again until 1927. That is to say, from 1905 when at the age of five years he was taken back to Germany by his parents, he made his home in Germany for twenty-two years, not returning to the United States until 1927. His father became a naturalized German citizen in 1917. The Court pointed out that Schaufus had resided in Germany from birth with the exception of a brief absence when a mere baby, until he was twenty-seven years old. His parents had established themselves as German citizens; he received his education in Germany, went to work and conformed as a German citizen to the laws and customs of Germany. There is nothing whatever to indicate that during the six years he remained in Germany subsequent to his attaining his majority, he ever gave the slightest evidence of claiming or intending to claim that he was an American citizen. The Court held further that the petitioner had lost the derivitive citizenship which he acquired by birth

from his father and it did not make any difference whether or not he had taken a German oath of allegiance.

It is the position of the appellant in this case that the petitioner had previously expatriated himself before the Nationality Act of 1940 went into operation in January, 1941, and that the principles set forth in the case of *Perkins* v. *Elg*, 307 U. S. 325, are applicable to the facts in this case as stated by the trial court in his first oral memorandum opinion (R. 227). By the Act of July 17, 1868, 16 Statutes at Large, 223, Congress declared that "the right of expatriation is a national and inherent right of all people." Expatriation is the voluntary renunciation and abandonment of nationality and allegiance. The Court pointed out in the Elg case that it has no application to the removal from the United States of a native citizen during minority. In other words, expatriation must be exercised after the petitioner attains the age of majority.

As has been pointed out, the petitioner's every action until he was at least thirty-four years of age indicated that he held himself out to be a British subject and a resident of Canada. He had every means of returning to the United States within a reasonable time after his twenty-first birthday but did not do so. He instead partook of the full advantages and privileges of a Canadian or British subject. Our Supreme Court in the Elg case, supra, has pointed out very distinctly that a minor, shortly after reaching twenty-one, who resided in a foreign country and claimed

to be a citizen of the United States must make some affirmative showing that he intends to continue or remain an American citizen. Here the petitioner did just the opposite and deliberately set out to disavow his American citizenship and assume that of a British subject until years later he decided that the United States would probably be the best place in which to live.

CONCLUSION

The judgment of the trial court entered on January 3, 1947 should be reversed and judgment should be rendered in conformity with the opinion of the trial court rendered on October 2, 1946 and the petitioner held to be a British subject and not an American citizen.

Respectfully submitted,

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APPENDIX

NATIONALITY CODE:

Sec. 801, Title 8, U.S.C.A. General means of losing United States Nationality.

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: Provided, however, That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his* chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed

to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. Oct. 14, 1940, c-876, Title I, Subchap. IV, S. 401, 54 Stat. 1168.

*So in original. Probably should read "this."

Sec. 802, Title 8, U.S.C.A. Presumption of expatriation.

A national of the United States who was born in the United States or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any

accompanying member of his family. Oct. 14, 1940, c.876, Title I, Subchap. IV, S. 402, 54 Stat. 1169.

Sec. 903, Title 8, U.S.C.A. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationalty status is pending before the court, and may be admitted to the United States with such certificate upon the

condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Supchap. V, S. 503, 54 Stat. 1171.